No. 15,292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,
Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor, by his Guardian *ad Litem*, HARRY SUTTON,
Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Pleadings consist of the Complaint and the Answer of Defendant North American Aviation, Inc., a corporation. Jurisdiction is based upon diversity of citizenship. Appellees (plaintiffs) are residents of the State of Ohio [R. 4, 102]. Appellant (defendant) is a Delaware corporation maintaining its principal place of business in the County of Los Angeles, California [R. 4]. The amount in controversy exceeds $3,000.00. The United States District Court had original jurisdiction of the action pursuant to the Constitution of the United States and Title 28, U. S. C., Section 1332(a).

The action is for the wrongful death of Fred L. Hughes a pilot in the United States Air Force. It was brought by his widow and infant son. The case was tried by jury and resulted in a verdict in favor of the widow and infant son in the sum of $125,000.00 on May 24, 1956 [R. 88]. Appellant filed a motion for judgment notwithstanding the verdict or for a new trial on May 25, 1956 [R. 88]. The court denied both motions on June 13, 1956 [R. 94]. Judgment on the verdict was filed June 4, 1956 [R. 93]. Notice of Appeal was filed July 2, 1956 [R. 95]. Jurisdiction of the United States Court of Appeals is based upon Title 28, U. S. C., Section 1291.

II.
STATEMENT OF THE CASE.

A. The Questions Involved and the Manner in Which They Are Raised.

Appellant listed five points on appeal [R. 884] and four specifications of assignments of error (App. Br. 22) and discussed these under three points in argument. In reality there is only one question, which is whether there is evidence to sustain the verdict of the jury.

In answer to this question Appellees will point to the substantial evidence which supports the verdict and will discuss the facts and applicable law under appropriate separate headings.

B. Introduction to Statement of Facts.

The evidence was conflicting in many details. The testimony of witnesses was frequently contradictory. There is no way that all of the testimony and all of the exhibits can be reconciled to represent one version of the tragic story of Lt. Hughes' death.

An attempt was made, however, to lay before the jury all that was observed by those who saw or heard the accident and all the knowledge that could be gleaned from the wreckage by experts. Those who testified as to what they saw or heard, saw or heard it from different positions and angles. Their testimony conflicted. The experts who combed the wreckage couldn't find all of the parts [R. 612, 719, 743] but testified generally that from the parts they did find, they could discern no *evidence* of malfunction or mechanical failure of the airplane. In arriving at their conclusions, the testimony of eye-witnesses was either not considered [R. 747, 748, 761] or completely discounted by the experts in favor of their observations of the remains [R. 748, 749, 761].

If only the testimony of the expert witnesses were considered and the testimony of the eye-witnesses disregarded entirely, there is a good chance that we would get the impression that the plane is capable of reassembly to operable condition because no mechanical fault can be found. A glance at the photographs brings a quick return to reality and a tendency to discount the assurance with which the experts purport to speak.

This thorough and substantial conflict does not appear from the recital of facts by Appellant. Appellant's statement of facts is like defendant's argument to the jury. It lacks the objectivity which a statement of facts in an appellate brief should contain.[1]

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[1]"Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence."

Slovick v. James I. Barnes Construction Co. (1956), 142 Cal. App. 2d 618, 622, 298 P. 2d 923.

It is necessary for Appellees to make a statement of facts to show not only the conflict which the jury had to resolve, but also to show that there was substantial evidence to support the jury's verdict. In making this statement, Appellees bear in mind the rule on appeal that conflicts must be resolved in aid of the judgment (*Worcester Felt Pad Corp. v. Tucson Airport Authority* (C. A. 9th, 1956), 233 F. 2d 44).

Some of the facts which are greatly stressed by Appellant have very little importance because regardless of how the conflicting evidence is viewed, the fact, when established, cannot be considered as a proximate cause of the accident. These are nevertheless mentioned in the following statement of facts and their lack of application is explained in argument.

C. Statement of Facts.

1. Decedent, First Lt. Fred L. Hughes, Was an Experienced Pilot.

Fred L. Hughes was a First Lieutenant in the United States Air Force and an experienced pilot. At the time of his death he was 25 years old [R. 110], a college graduate [R. 111], married [R. 103], and the father of an infant son [R. 106]. He was a veteran of 100 combat missions flown in jet aircraft in a foreign theatre [R. 103, 108, 132, 140]. He flew 144 hours combat time [R. 143]. His decorations included the Distinguished Flying Cross and Oak Leaf Clusters [R. 108, 112].

His experience included combat in the F86F airplane, the same type of plane in which he met his death on December 18, 1953 [R. 142]. He had been qualified for instrument flight for three years [R. 141]; in fact, he had been an instructor in instrument flying [R. 122, 144,

146]. He held a white card authorizing instrument flight since 29 November, 1951 which had been constantly maintained and never suspended [R. 154], but at the time of the accident this card was not current [R. 155]. From the 19th of April, 1953 to May of 1953 he was suspended from flying for unspecified physical reasons [R. 138]. Such suspension may result because the flyer has developed a cold [R. 138].

Two types of cards are issued by the Air Force, a green card and a white card. A pilot holding a green card may issue his own clearance for take-off while the holder of a white card must obtain clearance from the command of the air field [R. 154, 155]. One of the qualifications for a green card, according to Appellant's witness, is 100 hours of instrument time [R. 545]. First Lieutenant Hughes had 137 hours of instrument time prior to December 18, 1953 [R. 153]. In this respect, according to Appellant's witness, he met the qualifications for holding a green card. This is the only material point because Appellant's comments on this subject are intended to discredit the experience of decedent in instrument flight. Appellant states that the required instrument time for a green card is 500 hours, referring to the place in the record where the requirement is said to be 100 hours. At another point in the record, Appellees' witness stated that a green card required 500 hours of instrument time [R. 140].

By footnote on page 5 of its brief, Appellant contrasts the experience of the test pilots who testified for and were employees of Appellant. Their time in the air is impressive, but the most pertinent and probably the only comparison in context was omitted. Test pilot Kinkella, who held a green card, had approximately 150 hours of instrument time [R. 540]. Two things are apparent from

this fact: First, in all probability only 100 hours of instrument time is required for a green card and certainly not 500 hours, and second, First Lieutenant Hughes with 137 hours of instrument time as against Kinkella's 150 hours looks rather experienced in instrument flight. The record did not disclose the instrument time of the other test pilots who testified, so there is no way to make a comparison.

At the same time, the record shows that he was ordered from his station at Nellis Air Force Base to Los Angeles Airport to fly a new F86F jet aircraft back to his base. At the Los Angeles Airport, he was under the orders of the field military authorities. There was someone from the Army to direct him to take off and the civilian authorities wouldn't clear him without military approval [R. 155, 439]. He filed his flight plan and obtained clearance from military headquarters [R. 443]. An attempt to show the subsequent take-off was a violation of regulations resulted in questions by the court at several points [R. 546-548, 631-632] pointing up the conflict between military authority over subordinates and the regulations relating to the possession of white or green cards which were at one point likened to a rank [R. 140].

2. The Weather Conditions Were Normal for Los Angeles International Airport.

Visibility was officially fixed at one-half mile [R. 436]. The air traffic moved all afternoon both before and after the accident without interruption. Hundreds of planes of every type and including military, private and commercial planes came and went on schedule [R. 442].

The Weather Bureau established that officially visibility was one-half mile by observations taken of known objects at known distances from established observation points [R. 436]. The restriction to visibility is classified as

smoke and haze [R. 437] and this was only 300 feet thick [R. 438]—certainly not an unusual condition [R. 442]. There was a discrepancy between this official weather observation and the observations of some of the eye-witnesses to the accident, some of whom made their observations at a distance in excess of half a mile. This will be specifically mentioned below.

The only flights which the record discloses were canceled on December 18, 1953, because of weather, were the test flights of new military aircraft manufactured by North American Aviation, Inc., the Appellant [R. 307]. This was because there is an Air Force regulation which provides that no test flights can be made unless visibility is three miles or more [R. 307, 315]. On the other hand, no such limitation existed on flights for delivery of aircraft after completion of test flights [R. 319]. As a matter of fact, three deliveries were scheduled for December 18, 1953, and one was actually made about one hour before the accident in which First Lt. Hughes lost his life [R. 798]. The Chief Test Pilot did not know whether the third one took off or not [R. 798].

At the time of the accident fog had begun to come in from the ocean at the West end of the runway [R. 423]. The weather report which was issued two minutes before the accident did not note this. Witnesses testified as to the nature and extent of this fog.

Although visibility was restricted at the Los Angeles Airport, the weather was good. A fog condition was moving in at the far end of the runway, but whether the fog was dense or spotty with only occasional limitations on visibility depends upon the observation of the various witnesses. It was for the jury to determine the condition of the weather from the point of view of the pilot.

The evidence on the weather and concerning flight clearance and take-off instructions is covered in detail in the appendix (Appendix A). Appellant's statement of facts is woefully inadequate to reflect the variety of the testimony. Even the jury could not have summarized the evidence with the convenient brevity used by Appellant.

3. Neither the Instruments nor the Jet Engine Needed to Be Warmed Up.

There is no question of the fact that the jet engine in First Lt. Hughes' plane did not require a warm-up before taking off. In this respect jet engines differ from piston-driven engines used in what are now considered conventional aircraft.

Appellant states in its brief, page 6, that when instrument flight is contemplated, a five minute warm-up is required. Some of the witnesses used this expression. However, the actual fact of the matter was explained by Appellant's Chief Production Test Pilot, Mr. George Annis. He explains that the instrument in question is the vertical gyro horizon. This is an electrical instrument. When the switches are on, the gyro is operating. It takes five minutes for the gyros to come to speed to give a proper indication on the instrument [R. 456]. In other words, the warmth of the engine has nothing to do with the matter because the gyros operate electrically and are not dependent upon the operation of the engine.

The jury was told not only that thousands of these jet planes had been delivered and that Test Pilot Annis alone had flown 3 to 4 thousand flights in them without power failure or flame-out, but that in general they were as safe to operate as conventional aircraft [R. 325].

4. The Plane Was in the Exclusive Possession, Custody and Control of Appellant Until First Lt. Hughes Stepped Into the Cockpit.

It is an undisputed fact that Appellant manufactured the airplane, tested it for itself and then tested it for the Air Force and accepted it for the Air Force [R. 314, 320]. The acceptance flight for the Air Force was conducted by an employee of Appellant, who noted that certain adjustments had to be made after his flight in the airplane and then accepted the plane on behalf of the Air Force [R. 314]. The plane was not flown after these final adjustments were made and before the flight of First Lt. Hughes [R. 527].

5. There Was Evidence of Carelessness in the Process of Manufacturing and of Inspecting the Airplane.

A point not mentioned by Appellant in its Section E under Statement of the Case, page 7, Appellant's Brief, on inspection made of the aircraft prior to delivery, is the fact that the inspection disclosed that in the course of manufacturing the aircraft a fire had broken out in the electrical system and had been extinguished leaving a residue of foamite, a fire extinguisher fluid [R. 810]. The testimony was as follows:

> "Q. . . . Would you go back to L-4? I overlooked a couple of items. Would you read No. 3 on on that, 89, item 89 on that L-4? A. Due to use of foamite cleaner, it looks like, or due to use of foamite, clean all relay boxes and terminal connectors, such as reverse current relay, field current relay, armament relay, and so on.
>
> Q. What does that mean, Mr. Clayton? A. The only reason there would be any foamite in there would be if we had an electrical fire in the assembly.

Q. That means they had a fire there and put it out, isn't that right? A. It reads that way.

Q. Isn't that the final check-out sheet, squawk sheet, for the electrical system? A. No. This is down in the final assembly. This isn't the final squawk sheets of the airplane.

Q. This is the final assembly? A. That's right." [R. 810-811.]

There was no explanation as to the reason for the fire or any testimony that the reason had been corrected. The only information seems to be that the fire was extinguished and the residue of foamite was cleaned away from the electrical wiring involved.

6. The Instrument Known as the Vertical Gyro Horizon Had Time Enough to Stabilize Before It Could Have Been Needed.

Apparently one electrical instrument which is used when flying without visual reference to the ground requires about five minutes before it has stabilized for use. The evidence is that this instrument is in operation when the electric switches are turned on [R. 456]. It is not dependent upon the operation of the engine.

Two witnesses testified concerning the sequence of events between the time when decedent entered the cockpit and the time he started down the runway for take-off. These two were the security officer and the crew chief.

The crew chief, Rinaldi, testified that he performed an inspection of the aircraft, checking the whole aircraft and preparing the plane for flight [R. 399] and that he then helped First Lt. Hughes into the plane [R. 406, 415] and watched the pilot check the cockpit generally [R. 414]. He stayed on the wing until after the engine

was started by the pilot and was running [R. 400, 415]. He stayed on the wing for a minute or a minute and a half after the pilot got in and closed down the canopy. The engine was running during all of that time [R. 428]. He then got down and stood in front of the plane [R. 414]. He testified that it was a few minutes after the pilot started the engine before the plane started to go to the end of the runway [R. 425]. He said that he imagined that it took a few minutes to get down to the end of the runway, but that he did not know exactly how long it took [R. 411], and that when the plane reached the end of the runway, the pilot stopped for maybe 10 seconds [R. 425].

The testimony of the other witness conflicts in part with the foregoing but indicates that more than 10 seconds was spent at the end of the runway.

The security officer, Beaudry, testified that the decedent checked the plane externally, put on his parachute, climbed into the cackpit and brought his canopy to the half-way mark, started his engine and in 10 or 15 seconds after he started his engine he started to taxi down to the end of the runway [R. 574]. He revised this estimate by saying that it was less than a minute [R. 574]. After the plane reached the end of the runway, the engine was reved up twice and the witness then testified, "then he threw it back against the wall again and started to roll down the runway" [R. 575].

7. The Take-off Was Normal and at Full Power and the Plane Was Last Seen in an Attitude of Climb.

Rinaldi, the crew chief, was the only witness who testified that he did not believe that the engine was rotating at full throttle. The security officer, Beaudry, testified

that it was [R. 580] as did William Pitts [R. 641, 644]. Test pilot Smith testified to the same effect [R. 519] and Clifton B. Massey, who was a representative of General Electric Company, the manufacturer of the engine, who was at the North American plant at the time, concurred [R. 702]. Support for this version is found in the testimony of the various experts who examined the wreckage and who testified that the engine was operating at a high RPM at the time of the accident [R. 666, 667, 672, 716, 717, 718].

The point at which the plane left the runway or broke ground, as it is frequently characterized in the transcript, was fixed by Kunzler at approximately Sepulveda Boulevard [R. 556]. Sepulveda Boulevard is approximately 4,000 feet East of the West end of the runway [R. 556]. He went on to testify that while on crash truck duty, it was his job to watch all planes take off [R. 556] and that at the time that the plane passed directly in front of him, he estimated that it was about 75 to 100 feet off of the ground [R. 556-557]. It then disappeared in the fog, a trifle West of Hangar 9 [R. 557]. The distance between Hangar 9 and the crash truck at this moment was approximately 900 feet so that the plane was airborne for approximately 2,900 feet while witness Kunzler watched it from the crash truck.

William Pitts saw the plane before it entered the fog. He was standing between Hangars 8 and 9. He testified that he would judge the plane to be about 100 feet in the air at the greatest height while he was observing it. The wheels had been retracted and the flaps were up and the doors closed. He then testified that "the airplane was in a nose-high attitude; however, it didn't seem

to be climbing much" [R. 641]. He later testified as follows:

> "Q. At that time it had an attitude with the nose higher than the tail? A. That is correct.
>
> Q. Which indicated it was climbing? A. Well, it indicates he was in an attitude in which he intended to be climbing, yes, Sir.
>
> Q. An attitude for climbing, we will put it that way. A. Yes, Sir." [R. 645.]

Beaudry testified that when he last saw the plane it was on a very shallow upward climb [R. 576].

8. There Is Evidence That There Was a Flame-out, an Explosion in the Air, a Fire in the Air and Then a Crash.

The force which drives a jet plane forward is the flame from the jet engine. When the flame goes out, referred to as a "flame-out," the aircraft is without power. Appellant's most experienced test pilot testified that in the event of a flame-out on take-off, the approved procedure would be to stop the throttle and land straight ahead [R. 470], pointing out that when a pilot actuates the air start switch, he takes away the electric power of many other items in the aircraft and would lose the functioning of instruments, radio equipment and miscellaneous other gear while the switch is off [R. 467-468]. He pointed out that the speed for take-off in an F86F with external 200-gallon tanks attached will be in the neighborhood of 130 knotts [R. 469] or approximately 150 miles per hour. Test pilot Smith testified that the pilot is required to get the gear and flaps up for structural reasons before 185 knotts and that the take-off is completed at near 200 knotts [R. 511] or approximately 230 miles per hour.

Two witnesses testified that there was a flame-out. The Incident Report, Exhibit 2, in evidence, which was introduced without objection of appellant, states:

> "Subsequent reports from the City Operations personnel, from North American Aviation supervisors and from the City Fire Department personnel indicate the aircraft, a jet, had an apparent flame-out at approximately 100 feet altitude and had crashed on the west end of Runway 25L and had passed through the west airport fence, over Lincoln Highway and came to rest in the field adjacent to the airport, approximately 500 feet west."

Appellant's test pilot Frank C. Smith was in the flight office and saw the aircraft on take-off [R. 518]. He saw nothing out of the ordinary [R. 513] and it sounded as if the plane were on full throttle [R. 519]. He observed the aircraft as it passed the window. He lost sight of it in the obscuration and as he was returning into the lounge area heard the engine stop and an explosion followed immediately. He looked out and saw black smoke coming up through the fog [R. 524-525].

Mr. Kunzler, who was in the crash truck, heard a thud and at the same time heard the engine quit [R. 558] and then saw a large column of smoke come up through the top of the fog and after that heard another thud which he characterized as a rumble which he said was like an earthquake rumble. "The ground was shaking" [R. 558]. He did not hear an explosion [R. 559].

Three witnesses saw the airplane in the air after it had entered the fog. Witness Rogers saw the plane airborne 25 to 40 feet in the air before it had gotten to the end of the runway. There was a loud explosion and a big burst of flame and after that all he could hear was

metal, but he couldn't see on account of the fog [R. 180]. He could see the outline of the ship in the fog and when he first saw it, it was just a great big ball of fire [R. 181].

Walter Spencer was on Lincoln Boulevard when he first heard an explosion and then saw the plane when it dipped about 30 feet East of the fence on Lincoln Boulevard and seemed to hit the ground and then blow up. He noticed smoke prior to the time it hit the ground [R. 192]. He reiterated that he saw smoke before it hit the ground [R. 195]. It careened across the road and out into the field beyond [R. 192].

Witness Callagy was going North on Lincoln Boulevard and was 150 to 200 yards South of the scene of the accident [R. 185]. He saw the plane very shortly before the accident halfway between the end of the runway and the fence. It was airborne at the time. It looked as though it was coming in for a belly landing. The front was a little higher than the back and it wasn't over 4 or 5 feet off the ground at the most [R. 186]. Flame was coming out of the aft section of the airplane from both sides of the wing back to the tail section [R. 186]. The landing gear was up and he noticed that there were wing tip tanks, one on each wing [R. 189].

Witness William Pitts testified that he heard an explosion and that the engine stopped at the same time [R. 645].

Conflicting evidence came from opinion witnesses who testified that their examination of the wreckage disclosed no evidence of the flame-out and in some cases that it was their opinion that there was no flame-out [R. 695, 696, 705]. These opinion witnesses had arrived at their conclusions either without the benefit of the testimony of

the eye-witnesses or this testimony was completely discounted on the ground that there was no physical evidence of flame-out [R. 748, 749, 761].

9. The Opinions of the Experts Had No Affirmative Foundation, but Were Based Upon a Failure to Find Evidence of Mechanical Failure.

As pointed out in Appellant's Brief, the aircraft was completely demolished in the accident. One of the pilots was unable to identify certain parts because as he explained, "This airplane is in pretty bad shape" [R. 481-482]. The experts who investigated the wreckage to attempt to determine the cause of the accident were "unable to make an operational check of the normal hydraulic system, the normal control system, hydraulic pump, as the power take-off unit, or power take-off section of the engine was badly damaged, and the pump shaft was sheared." They were able to find only part of the pressure switches. Some found were so badly damaged that laboratory check was precluded. The valve that controls the fuel into the engine was never recovered [R. 612, 719]. A great portion of the hydraulic system was broken in pieces and burned so that they could not be examined [R. 779-780].

There is no evidence of any attempt made to trace the electrical system. The flight control system is operated hydraulically. The main hydraulic system obtains its power from the engine [R. 743]. This system was too badly damaged to be examined. The alternate hydraulic system is electrically operated. The boost pumps which force most of the fuel to the engine are electrical and a failure of a connection or a disconnection of electric current would cause these pumps to fail [R. 473]. Failure of the electrical system could also affect the flight control system if

the main hydraulic system were not operating. The experts testified that the investigation showed that the alternate system was not in operation, but it also showed that the manual emergency changeover handle was found to be within ¼ of an inch of full changeover position from the normal to the emergency system [R. 616].

A hole in the cowling and another hole in the floor appear in the photograph, Exhibit 5 [R. 481-482]. The metal bulged out toward the cockpit [R. 765-766].

The airplane was traveling in a westerly direction at the time of the accident and it crashed 125 feet West of the end of the runway and apparently bounced across Lincoln Boulevard and lit again East of the highway where it broke up. The persons investigating the accident made a map showing where parts of the plane were found. This map discloses the following information: 325 feet East of the point of first impact a tail pipe clamp piece and a DZUS fastener were found. 200 feet Easterly of the point of impact a nut and a piece of bolt were found. Approximately 225 feet Northeast a piece of tail pipe bracket was found. Approximately 200 feet Northeast a nut and a piece of bolt were found. 150 feet Northeast a steel bolt, a piece of engine accessory case and a piece of tail pipe bracket were found. [See Exhibit E.]

Two witnesses testified that the law of inertia would tend to carry any part which fell from a plane in a forward direction or in this case in a Westerly direction [R. 688, 750, 751, 752]. It seemed to be the theory of the experts that the 200-gallon drop tanks on the wings of the airplane exploded at the point of first impact. These two tanks can be seen in photographs, Exhibits G-2, G-6 and G-7. They are free of the plane and substantially intact. Expert Joseph Hoffman testifying as to the fuel system

stated with reference to the tanks that they were thrown clear of the ground fire and that he found in one of them a small pocket of fuel [R. 714-715], which is not indicative of an explosion.

Investigation of the ground shows the points of first impact and witnesses testified that the marks made indicate that the plane came in at a very steep attitude and that it does not indicate any attempt to land in a flat attitude. The explanation offered is that they were able to find a trim actuator which was taken into the laboratory and measured and through layouts and drawings computed that the stabilizer was trimmed .7 of a degree up which would cause the airplane to nose down [R. 738-739, 741-742, 763].

The investigators admitted that the forward part of the skin forward of the stabilizers and the skin along the sides of the fuselage leading back was smoked. So were the horizontal stabilizers. This portion of the airplane was thrown clear of the area on the ground which burned over [R. 804].

Notwithstanding the foregoing facts, the experts testified that they did not find evidence of mechanical malfunction, although they admitted that they either had not taken into consideration or had discounted the testimony of eye-witnesses. In other words, although the plane was completely demolished, those parts which were found and those systems which were traceable did not reveal to the experts that these systems had failed to function and it was on this negative evidence that the opinion was formed that there was no mechanical failure of the plane.

III.

ARGUMENT.

A. The Facts Support the Verdict.

In this brief the evidence has been referred to in detail in view of its rather cursory treatment in Appellant's Brief and in consideration of the claim of Appellant that there is no evidence to support the verdict. Appellees are aware that unless the contrary is shown, it is presumed that there is evidence to support the verdict and that where the evidence is conflicting, the version which supports the verdict is accepted as established.

From the foregoing statement of facts a conflict appears at almost every point which Appellant's Brief has treated as material to consideration of this appeal. In each such instance it must be assumed that the version favoring the verdict is the true fact.

The fact that foamite was found upon part of the electrical system as the plane neared final assembly, indicating that there had been a fire, is without conflict. That the parts affected by the fire were not replaced or inspected for fire damage subsequent to the fire is indicated by the presence of the foamite and that the only thing required by the inspector was to clean it off.

There is no duty on Appellees to reconstruct the sequence of events by analysis of the evidence. And there is no way to know how the jury viewed the facts. Thinking that a suggestion as to how the jury might have considered the evidence to reach its verdict might be of some assistance, the following is submitted with the understand-

ing that there are other equally acceptable reconstructions of the accident from which the jury could find for the plaintiffs.[2]

After take-off, the plane was airborne with wheels and flaps up and doors closed over the wheel wells [R. 641]. It was in an attitude of climb, but not climbing very fast [R. 641]. This suggests trouble. A possible and perhaps likely source of the trouble is a broken or leaking fuel line [R. 478]. Since the main power take-off from the engine was too broken to be examined, and the fuel control valve was never recovered, this possibility cannot be precluded [R. 612, 719].

At this point the pilot may have had trouble with the flight control system and recognizing a loss of power, sought to switch to the emergency system [R. 616]. Before this could be accomplished, the leaking fuel may have been ignited by a spark from the defective wiring or otherwise and an explosion with fire following or a flame-out and explosion and fire or any combination of these followed.

The pilot then undoubtedly lost control, probably because of an explosion into the cockpit and possibly because of loss of the electrical or hydraulic system or both, and a crash followed. There is evidence to support each step in this chain.

The evidence is clearly indicative of mechanical failure, which the circumstances indicate is the fault of the

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[2]In *Jaffke v. Dunham* (Jan. 14, 1957), 352 U. S. 285, 1 L. Ed. 2d 314, the Supreme Court of the United States said:

> "A successful party in the District Court may sustain its judgment on any ground that finds support in the record."

See also *Petersen v. Riesebel* (1953), 115 Cal. App. 2d 758, 252 P. 2d 986, which holds that it is to be presumed that the jury reached its verdict on a theory that is supported by the evidence.

manufacturer. Negligence in manufacture and inspection is evidenced by what has already been said of the evidence of a fire in the fuselage during manufacture. There being no evidence that the cause was discovered or rectified or that any effort was made to do so, the possibility of it happening again may be inferred. And such a fire could well be the proximate cause of the accident. Moreover this specific instance of carelessness is indicative of an attitude of indifference from which the jury might well infer a general lack of due care in manufacture and inspection.

Appellees do not rest their case on this possibility alone, but upon all of the circumstantial evidence which clearly points to Appellant's negligence. Appellees further firmly believe that the doctrine of *res ipsa loquitur* is applicable and that the verdict may rest on the jury's application of this legal principle.

It is hard to understand the refusal of the experts to attach real significance to the testimony of eye-witnesses particularly in view of the fact that the accident happened only a second or two after the plane was lost to view in the fog [R. 558, 640]. In only five or ten seconds it would have been above the obscuration [R. 529]. There was hardly time for pilot reaction between when last seen and the loud noise heard by all witnesses. The experts so resolutely turned their backs upon the testimony of what was actually seen to happen that they failed to note how well this testimony was supported by the physical evidence.

A plume of smoke rose 300 feet in the air [R. 558]. This is certain indication of explosion. There were parts of the plane scattered on the runway although the point of impact with the earth was as far away as 325 feet from some of them and despite the tendency of such parts to

travel in the same direction as the airplane. The supposition of Appellant that the wing tanks exploded on contact with the ground is not supported by the psysical evidence. These tanks carry fuel of an explosive force equal to 70 to 75 sticks of TNT [R. 772] and yet no crater is evident where the tanks struck the earth and for a short distance gouged out a shallow path of their own width. Some fuel was found in one of them after the accident [R. 714, 715]. They are to be seen substantially intact upon the ground in the photographs, Exhibits G-2, G-6, G-7.

It seems most likely that the wing tanks simply cracked open on contact and that their spilling contents were ignited. They were seen intact upon the airplane as it bounced across the highway [R. 189]. And the section of the plane thrown clear of the ground fire showed signs of fire on its wings and tail section [R. 804]. The attitude of the plane shows that it crashed nose down which would indicate loss of control. A large part of the observable physical evidence points to mechanical trouble in the air. The jury was well supported by substantial evidence of all types in a conclusion that mechanical failure caused the accident—flame-out, explosion or fire, or all three.

> "It is no answer to say that the jury's verdict involved speculation and conjecture." (that accident was impossible and must have been murder). "Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only when there is a complete absence of probative fact to support the conclusion reached does a reviewable error appear. But

when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard as disbelief whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

Lavender v. Kurn (1945), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 923.

B. There Was No Evidence of Possible Pilot Error.

To argue that the accident was caused by pilot error is a weak effort which finds no support in the evidence.

If the jury concluded that the crash was caused by an explosion or fire in the air, as it very probably did do, then the condition of the weather, the pilot's experience, the stabilizer trim and all of the other little items upon which there was such voluminous and conflicting testimony are entirely immaterial. Since the jury could have so decided, on appeal it must be assumed that the jury did so decide.

In fact the Appellees' case insofar as it relates to evidence of mechanical failure can well rest right there. But Appellant has listed supposed possibilities of pilot error. They are characterized as non-negligent because in the circumstances there is no evidence of pilot negligence. Moreover, there is a presumption with the weight of affirmative evidence against negligence of the pilot and evidence to the contrary merely raises a question of fact which has been adversely resolved against Appellant. Just to clear the atmosphere on this subject, the contentions of Appellant commencing at page 18 of its brief are treated seriatim.

(a) A pilot induced throttle burst is absolutely precluded because this never happens on take-off [R. 471-472].

(b) The testimony is overwhelmingly to the effect that the pilot could not accidentally cut the fuel supply and that to do so intentionally would be suicide [R. 474, 476, 478]. No such speculation can be indulged because of the presumption that the pilot acted with due respect for his own safety (C. C. P. 1961).

(c) The hypothesis that the pilot might "hit" the stick and move it in the wrong direction is preposterous. His life depends upon his hold on the stick and his experience was such as to eliminate any danger of a deliberate turn toward the ground. He was last seen with flaps and wheels up in proper attitude of climb [R. 564].

(d) Nothing more need be said about the experience of this pilot. Reference is respectfully made to Point II C-1 of this brief. There is no reason to suppose that the pilot took off on visual flight and switched to instruments, nor is it established beyond a jury question of fact that he lost visual contact with the ground at any point. At the same time it is equally consistent with the evidence to suppose that he was on instruments from start to finish and that his instruments were warmed up and perfectly functioning.

(e) As pointed out in Point II C-3 the idea that the uncontradicted evidence establishes that the plane or the instruments were not properly warmed up is a mistaken notion.

(f) The evidence of the actuator setting is the theoretical result of laboratory paperwork and there is no testimony to the effect that the angle of impact compares

with the supposed setting. No such comparison was attempted.

(g) The only bad thing about the weather was a fog bank at the far end of the runway and the pilot was airborne long before he reached the fog. The jet engine does not need a warm-up.

(h) There is no evidence that the pilot attempted to fly on visual contact or on instruments or of any switch from one to another. His clearance authorized either at his own election. Kinkella did not know or testify as to what this pilot did.

(i) The throttle is not a delicate instrument [R. 520] nor can it be accidentally cut [R. 476].

C. The Facts Most Favorable to the Verdict Must Be Deemed True and Only Those Inferences in Favor of the Verdict May Be Drawn.

The finding of the jury upon a question of fact is conclusive on appeal. Even the Supreme Court of the United States cannot disturb such a finding.

Cunningham v. Springer (1907), 204 U. S. 647, 51 L. Ed. 662;

First Unitarian Society of Chicago v. Faulkner (1875), 91 U. S. 415, 23 L. Ed. 283;

Nudd v. Burrows (1875), 91 U. S. 426, 23 L. Ed. 286.

Appellant's counsel states flatly that there is absolutely no evidence to support the jury's finding of negligence. There is no other hope of overturning the verdict. The magnitude of the burden with which Appellant is faced is underlined by the authority upon which Appellant relies at page 24 of its brief, *Jacobson v. Northwestern Pacific Railroad* (1917), 175 Cal. 468, 473. In that case the

court pointed out that the jury will be reversed only where the evidence is undisputed and capable of supporting but one inference or is conclusively contrary to the verdict. Such a case is not now before the court. Only a cursory examination of the record indicates that the evidence is conflicting and capable of more than one inference. When different inferences reasonably can be drawn from the evidence, the reviewing court is without power to substitute its deductions for those of the trial court. *Owens v. White Memorial Hospital* (1956), 138 Cal. App. 2d 634, 638, 292 P. 2d 288.

Upon a claim of insufficiency of the evidence the burden rests upon the Appellant to demonstrate that there is no substantial evidence to support the challenged findings. *Nichols v. Mitchell* (1948), 32 Cal. 2d 598, 600, 197 P. 2d 550. The power of an appellate court begins and ends with a determination of whether there is any substantial evidence, direct or indirect, contradicted or uncontradicted, to support the inferences adopted by the trial judge or jury. *Estate of Moore* (1956), 143 Cal. App. 2d 64, 67-68, 300 P. 2d 110.

Appellate review starts with a presumption that there is evidence in the record which sustains every finding of fact. *Tesseyman v. Fisher* (1952), 113 Cal. App. 2d 404, 407, 248 P. 2d 471. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient, as a matter of law the judgment must be affirmed. *Estate of Teel* (1944), 25 Cal. 2d 520, 527, 154 P. 2d 384.

D. The Trial Judge Did Not Lend Support to Appellant's Contention That There Was No Evidence to Support the Verdict, but Hued to the Line Established by Appellate Authority.

Every opportunity was given to the trial judge to rule that there was no evidence which could support a verdict based upon negligence. Although viewing the case as one not calling for application of *res ipsa loquitur,* he refused to grant the following motions: for nonsuit, for an instructed verdict for defendant, for judgment notwithstanding the verdict and for a new trial. See the interesting discussion of the facts [R. 857-880].

After the motion for a new trial had been argued, the trial judge recognized that the size of the judgment was such as to make an appeal almost inevitable. He even concluded that he probably would not have granted judgment for the plaintiffs. However, he was steadfast in his judgment that there was evidence sufficient to go to the jury. He then told counsel that he was not going to shift the burden of appeal by upsetting the jury's verdict. He observed that the case was fairly tried before a good jury and then said:

> "I think I will place the burden of the appeal upon the defendant rather than upon the plaintiff. I don't feel justified in substituting my opinion for the opinion of the jury." [R. 878.]

The trial judge recognized that the burden of appeal should rest where the jury verdict left it, in this case upon the defendant. This was a just decision and it rests upon recognition of the conflicting character of the evidence.

The Supreme Court of the United States said much the same thing in *Tennant v. Peoria and P.U. Ry. Co.*

(1943), 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520:

> "It is not the function of a court to search the evidence in order to take the case away from the jury. . . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, receives expert instructions, and draws the ultimate conclusions as to the facts. *The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion, whether it relates to negligence, causation or any other factual matter cannot be ignored.* Courts are not free to set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." (Emphasis added.)

The foregoing decision was relied upon by the Court of Appeals for the Ninth Circuit in *Southern Pacific Company v. Heavingham* (C. A. 9th, 1956), 236 F. 2d 406, to uphold the jury's right to pass upon a very close question of fact. And this same court had previously relied upon the *Tennant* case to reverse the trial court which granted defendant's motion for judgment notwithstanding the verdict in *Eastman v. Southern Pacific Company* (C. A. 9th, 1956), 233 F. 2d 615, 618, pointing out that the jury could judge the credibility and bias of the witnesses.

For the sake of completeness, we cite authority which supports this point in argument and also Point C above: The rule is best expressed in the words of the court in

Kinkston v. McGrath (C. A. 9th, 1956), 232 F. 2d 495, 497:

> "As said in Wilkerson v. McCarthy, 1949, 336 U. S. 53, 57, 69 S. Ct. 413, 415, 93 L. Ed. 497, 'It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inference which tend to support the case . . .'"

E. An Inference Reasonably Drawn Constitutes Substantial Evidence.

Where direct and positive evidence of a fact is not available, proof may be made by means of indirect evidence, and the decision of the court may rest on reasonable inferences as well as on direct evidence. Such an inference, reasonably drawn, constitutes substantial evidence.

Williams v. Insurance Commissioner (March 14, 1957), 149 A. C. A. 162, 308 P. 2d 52;

Ignagni v. A. J. Peters & Son (1957), 147 A. C. A. 794;

Majestic Securities Corporation v. Comr. of Internal Revenue (C. C. A. 8, 1941), 120 F. 2d 12;

C. C. P., Secs. 1957, 1958.

F. Circumstantial Evidence Is Sufficient to Support the Jury Verdict.

The point has been made that all of the evidence cannot be reconciled to fit into a single rationalization of the circumstances surrounding the accident. The plaintiff does not have to elect or to establish one inescapable inference (*Singer v. Marx* (1956), 144 Cal. App. 2d 739, 301

P. 2d 440, 444). The opinion in the case of *Katenkamp v. Union Realty Co.* (1940), 36 Cal. App. 2d 602, 617, 98 P. 2d 239, 246, makes a further point:

> "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom, because it is now settled law that 'circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury.' (Several citations omitted) . . . Ley v. Bishopp, 88 Cal. App. 313, 263 P. 369; Barnham v. Widing, 210 Cal. 206, 214, 215, 291 P. 173. In the last-cited case, where the judgment was based upon an inference drawn from circumstantial evidence although the inference was opposed to the direct testimony of the defendant and another witness, the Supreme Court upheld the judgment declaring at page 215 of 210 Cal., at page 177 of 291 P.: 'The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary.' In Mah See v. North American Acc. Co., supra (190 Cal. 421, 213 P. 44, 26 A. L. R. 123), the court declared the rule to be that 'even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury * * * the verdict of the jury * * * cannot be set aside by this court on the ground that it is not sustained by the evidence.' "

The late case of *Rodela v. Southern Cal. Edison Co.* (1957), 148 A. C. A. 738 quotes from the *Katenkamp* case with approval and is to the same effect.

In the case at bar there was direct evidence of flame-out, explosion and fire in the air. All of the evidence indicated that a flame-out on take-off was practically unheard of and could only result from fuel starvation [R. 479]. The idea was advanced that this could possibly be pilot induced. The likelihood that the pilot could accidentally cut off the fuel was heavily discounted [R. 478]. It was pointed out that deliberately doing so would be tantamount to suicide [R. 480] so the presumption that the pilot did not do so, but acted with due regard for his own safety (C. C. P. 1963) stands as uncontradicted evidence.

This leaves the remote possibility that the pilot accidentally shut off the fuel. Against this is the obvious possibility of mechanical failure [R. 479] such as a leak or break in a fuel line [R. 612, 719]. An aid in resolving this conflict is the testimony of explosion or fire which no one contends could be pilot induced. Ordinary experience would indicate that leaking fuel would be apt to catch on fire or explode from the heat of the engine or tail pipe or an electrical spark.

There can be no doubt but that the jury had the right and duty to decide whether flame-out occurred, whether it was pilot induced or the result of mechanical failure, whether there was an explosion in the air, whether there was a fire in the air. The jury could determine these questions in any order and when one fact had been established it could aid in resolving the remaining uncertainties.

The only evidence against the inference of mechanical failure was the testimony of experts who examined the wreckage and testified that they found no evidence from the parts which were still whole enough to be examined. This obviously does not preclude mechanical failure. Their opinion to the effect that there was no mechanical failure was open to challenge because their minds were closed to all evidence except their own physical examination of the wreck, because even some of this physical evidence was subject to other interpretation, because of bias and because of general conduct and demeanor—whatever it may have been.

It is to be expected that most of these expert witnesses would be employees of the Appellant, but it was the fact.

> ". . . the jury could disbelieve the testimony of any of the witnesses. 'The jury was * * * judge of the credibility of these witnesses and of the weight to be given their testimony. The jury could take into consideration in appraising this testimony the fact that they were employees of the appellant railway company and, as such, interested in avoiding the imputation that their negligence caused the death of a fellow employee.' Chicago & N. W. R. Co. v. Grauel, 8 Cir., 160 F. 2d 880, 826."
>
> *Eastman v. Southern Pacific Company* (C. A. 9th, 1956), 233 F. 2d 615, 618.

The implied finding of the jury was that there was mechanical failure.

> "There can be no argument that the jury would have been entitled to find that the *center column was in fact defective*, since the accident itself is evidence thereof. Paxton v. County of Alameda, 1953, 119 Cal. App. 2d 393, 408, 259 P. 2d 934. There was

> ample testimony in the record as well for the jury to arrive at this conclusion." (*Sullivan v. Shell Oil Company* (C. A. 9th, 1956), 234 F. 2d 733.)

Appellant does not seriously contest the jury's right to so find. Appellant's serious effort to upset the jury verdict is directed at the further implied finding that the mechanical failure was the result of Appellant's negligence.

There is circumstantial evidence of this fact. The presence of foamite on a portion of the electrical system indicates fire. There was no testimony to dispute the natural conclusion that a fire in the course of construction is inconsistent with careful and proper construction methods. There was no evidence to rebut the general experience of man that fire is destructive to electrical insulation. The very presence of the foamite indicated that the wiring had not been replaced. The inspection did not go beyond a direction to clean off the foamite. This may have been taken by the jury as indicative not alone of carelessness in the manufacture of this very plane, but also of an attitude of indifference at the time of inspection.

In support of the same conclusion is the fact that the final inspector was unable to read some of the writing on the inspection sheet as to the complaint or as to its correction. The writing was not his own; so there was no reason to expect that he could have read it easier at the time of inspection, yet he passed the items [R. 816]. The crew chief Rinaldi undoubtedly made a poor impression. He was charged with the duty of making the final corrections and in getting it ready for flight [R. 392]. His memory as to what he did was poor enough to cast doubt upon whether he did what was required.

From this testimony the Appellant intended the jury to infer that great care had been taken in the course of both manufacture and inspection of the aircraft. There can be little doubt from what has been said that the opposite inference is equally tenable. When coupled with the fact that the unusual accident occurred due to mechanical failure, as the jury no doubt concluded, and the fact that the full responsibility for the mechanical condition of the airplane was squarely upon the shoulders of Appellant, the question of whether Appellant's negligence was responsible for the accident was a question of fact.

A question of fact arising either from conflicting positive testimony or from conflicting inference is a question of fact for the jury. (*Spolter v. Four-Wheel Brake Service Co.* (1950), 99 Cal. App. 2d 690, 222 P. 2d 307, 310.) The court in the last cited case points out that if the evidence contrary to the existence of the fact sought to be established is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the fact has been established as a matter of law; otherwise, it is a question of fact for the jury to decide.

In the case at bar, the trial court properly left the decision to the jury for the reasons outlined in the following quotation from the *Spolter v. Four-Wheel Brake Service Co.* case at 222 P. 2d 312:

> "'Appellant contends that the inference was rebutted as a matter of law. Such contention is not sound. The trier of the facts is the exclusive judge of the credibility of witnesses. Sec. 1847, Code Civ. Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that "This presumption, however, may be repelled by the manner in which he testifies, by the character

> of his testimony * * * or his motives, or by contradictory evidence." In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal. Jr. 180, Sec. 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. . . .'"

and further in the same decision on page 313 of 222 Pac. 2d, the court quotes with approval from another case:

> ". . . 'In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference.'"

The rule of decision in civil cases is a rule of probabilities only and the choice as to which version of the facts is most probable is exclusively within the province of the jury. (*Singer v. Marx* (1956), 144 A. C. A. 739, 301 P. 2d 440, 444.) The latest California case on the subject of circumstantial evidence is the case of *Ignagni v. A. V. Peters & Son* (1957), 147 A. C. A. 794, which supports the points made in the foregoing discussion.

G. The Doctrine of Res Ipsa Loquitur Is Applicable.

The law of California governs the application of the doctrine of *res ipsa loquitur* which is substantive law.

Woodworkers Tool Works v. Byrne (1951), 191 F. 2d 667;

Lackman v. P. A. Greyhound Lines (1947), 160 F. 2d 496;

Smith v. P. A. Central Airlines Corp. (1948), 76 Fed. Supp. 941.

The doctrine is recognized in most States of the Union but each State has its own version. A decision in one State is therefore not necessarily authority in another. In some States it is held to be a question of law as to whether the circumstances do or do not warrant application of the doctrine. This is not the law of California.

The law of this State is well expressed in *Sloboden v. Times Oil Co.* (1956), 145 A. C. A. 243, 302 P. 2d 34.

> "Res ipsa loquitur is based in great degree on probabilities; it is a simple, understandable rule of circumstantial evidence with sound background of common sense and human experiences rather than rigid legal formula designed largely for exclusionary purposes."

1. It Is for the Jury to Determine Whether Each of the Conditions Necessary to Bring Into Play the Doctrine of Res Ipsa Loquitur Is Present.

As stated by the California Supreme Court in the recent case of *Seneris v. Haas* (1955), 45 Cal. 2d 811, 291 P. 2d 915,

> ". . . The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved. (citing cases.)"

The doctrine is applicable if it can be said that in the light of common experience or from evidence in the case, the accident was more probably than not the result of defendant's negligence. (*Zentz v. Coca-Cola Bottling Co.* (1952), 39 Cal. 2d 436, 247 P. 2d 344.) However:

> ". . . The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw

so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities.

"In order that a plaintiff be entitled to the benefit of the doctrine of res ipsa loquitur, he need not exclude every other possibility that the injury was caused other than by defendant's negligence." (Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183, 194-198.)

In *Bauer v. Otis* (1955), 133 Cal. App. 2d 439, 443, 284 P. 2d 133, the court pointed out:

"The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it."

2. The Doctrine of Res Ipsa Loquitur May Be Relied Upon to Support a Judgment Although No Jury Instruction Is Given.

Jaffke v. Dunham (1957), 352 U. S. 285, 1 L. Ed. 2d 314;

Rogers v. Los Angeles Transit Lines (1955), 45 Cal. 2d 414, 289 P. 2d 226;

Rose v. Melody Lane (1952), 39 Cal. 2d 481, 247 P. 2d 335.

3. The Accident Was of a Kind Which Does Not Occur in the Absence of Someone's Negligence.

The F86 jet plane delivered to Lt. Hughes was not an experimental model [R. 460, 479]. This particular type of plane had been manufactured by Appellant for four

years [R. 460]. Thousands had been delivered to the Army [R. 330]. A jet plane is no more dangerous than a prop plane [R. 325-326].

It is an extraordinary event for a jet to have a flame-out, to explode or to burn upon take-off [R. 328, 469-470, 479, 626, 627].

Test pilot Annis had flown three to four thousand flights in F86's without experiencing flame-out on take-off or fire or explosion [R. 479]. He had never heard of a plane exploding during take-off [R. 469-470].

The case of *La Porte v. Houston* (1948), 33 Cal. 2d 167, 199 P. 2d 665, is distinguished from the instant case by the fact that there was nothing that the defendant *could* have done to cause the accident.

In the case of *Morrison v. LeTourneau Co. of Georgia* (1943), 138 F. 2d 339, the Fifth Circuit, applying the law of Georgia, refused to apply the doctrine of *res ipsa loquitur* to an airline accident involving the crash-death of a pilot and his passenger. This case is contrary to the doctrine of *res ipsa loquitur* as applied in the State of California and the Ninth Circuit.

Parker v. Granger (1935), 4 Cal. 2d 668, 52 P. 2d 226;

Smith v. O'Donnell (1932), 215 Cal. 714, 12 P. 2d 933;

Boise Payette Lumber Co. v. Larsen (1954), 214 F. 2d 373 (Sustained jury verdict for plaintiff without any actual evidence of negligence and without reference to the doctrine);

Smith v. Alaska Airways (C. C. A. 9th, 1937), 89 F. 2d 253.

In the case of *Williams v. United States* (1955), 218 F. 2d 473, the Fifth Circuit said that under the law of Florida the doctrine was only applicable to cases involving circumstances which are within the common ordinary experience of most people. The case serves to exemplify that the law of Florida differs from the law of California, but it is of no further significance.

The difference between the law of California and the law of Wyoming appears in *Cohn v. United Air Lines Trans. Co.* (1937), 17 Fed. Supp. 865, wherein the District Court states:

> ". . . the law tells us that the doctrine of res ipsa loquitur shall not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all."

4. The Condition Requiring Exclusive Control in Defendant Is Satisfied.

The requirement of control is not an absolute one. The fact that the accident occurred sometime after defendant relinquished physical control of the instrumentality which caused the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by plaintiff's decedent or some third person or its condition otherwise changed after control was relinquished by defendant.

Zentz v. Coca-Cola Bottling Co., supra;

Nungary v. Pleasant Valley etc. Assn. (1956), 142 Cal. App. 2d 653, 300 P. 2d 285;

Burr v. Sherwin-Williams Co. (1954), 42 Cal. 2d 682, 268 P. 2d 1041.

It is the control of the instrumentality by defendant at the time of the negligent act which satisfies the control element.

Rohar v. Osborne (1955), 133 Cal. App. 2d 345, 284 P. 2d 125;

Fields v. Oakland (1955), 137 Cal. App. 2d 602, 291 P. 2d 145;

Baker v. Goodrich Co. (1953), 115 Cal. App. 2d 221, 252 P. 2d 24;

Hoffing v. Coca-Cola Bottling Co. (1948), 87 Cal. App. 2d 371, 197 P. 2d 56;

Escola v. Coca-Cola Bottling Co. (1944), 24 Cal. 2d 453, 150 P. 2d 436;

Liggett and Myers Tobacco Co. v. De Lape (C. C. A. 9th, 1940), 109 F. 2d 598;

Michener v. Hutton (1928), 203 Cal. 604, 265 Pac. 238.

The evidence in this case is clear and without contradiction that the Appellant had full physical control over the jet plane until the moment when Lt. Hughes climbed into the cockpit (Point II C 4 of this brief). He had physical control of the instrumentality only for a few minutes before the accident. After Lt. Hughes climbed into the cockpit and until the moment when the aircraft entered the obscuration at the far end of the airstrip there was no change in the condition of the aircraft.

There is no evidence that Appellees' decedent improperly handled the instrumentality. There is a presumption which is evidence in the case that he exercised all due care. (C. C. P. Sec. 1963.) As pointed out in this brief (Point II B) non-negligent pilot error could not have caused the disaster.

Appellant cites the case of *Parker v. Granger* (1935), 4 Cal. 2d 668, 52 P. 2d 226 as holding that Appellees are precluded from the use of the doctrine of *res ipsa loquitur* because of the lack of exclusive control in Appellant.

However, in that case the Supreme Court held that *it was for the jury to determine for itself whether the doctrine of res ipsa loquitur applies* and that the jury could find that in this particular factual situation that the doctrine was not applicable.

The other cases cited in Appellant's Opening Brief, page 32, are either in favor of Appellees' position or not in point. (*Michener v. Hutton* (1928), 203 Cal. 604, 609, 265 P. 2d 238, "The maxim may be applied even when the thing causing injury was not in the immediate custody or management of the defendant or his servants."; *Olson v. Whithorne* (1928), 203 Cal. 206, 263 Pac. 518, plaintiff was properly found guilty of contributory negligence; *La Porte v. Houston* (1948), 33 Cal. 2d 167, 169, 199 P. 2d 665, "assuming that defendants were in control of the car"—there was no probability in favor of defendants' negligence.)

5. The Accident Could Not Have Been Due to Any Voluntary Action or Contribution on the Part of Appellees' Decedent.

Appellees agree that an element of the doctrine of *res ipsa loquitur* is lack of contribution. However, contribution is a question of fact to be resolved by the jury. (*Seneris v. Haas* (*supra*), p. 823. "We are of the opinion that the jury, under appropriate instructions, should have been permitted to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur were present.")

The case at bar is not governed by the case of *Spencer v. Beatty Safway Scaffold Co.* (1956), 141 Cal. App. 2d 875, 297 P. 2d 746. The distinctions are apparent when a paragraph omitted by Appellant in Appellant's Opening Brief, Appendix E is inserted:

> "As proof that negligence of respondents did not cause appellant to fall, it is recalled that he had for eight months been familiar with the method of operating the bleacher, and had been the chief actor in its operation. He had never discovered anything out of order. On the contrary, *he had abused the plyboard by standing on the lid which was not designed to support a man's weight.* Such practice may have caused a warping of the plyboard and thus have added to the friction of the cable and caused it to be immobilized." (P. 882.)

The record together with the disputable presumption of due care which Appellant does not contend was rebutted permits "a reasonable inference that it (the aircraft) was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff. . . ." (*Escola v. Coca-Cola Bottling Co.* (1944), 24 Cal. 2d 453, 458, 150 P. 2d 436.)

Appellant misconceives the attitude of Appellees with respect to the presumption of due care which applies to decedent's conduct. It is a simple fact that there is no evidence in the record to indicate that decedent contributed to the cause of the accident. Each of the matters referred to by Appellant on pages 35 and 36 of its brief have been fully discussed heretofore in this brief under appropriate headings.

Generally speaking the attempt of Appellant to point to contributing causes to the accident has resulted in the rankest speculations and improbable suppositions. Ap-

pellees simply claim that the California law requires the question of contribution to be submitted to the jury in the same manner as any other question of fact.

Appellant argues on page 34 of its brief that any possible negligence which might be inferable to Appellant has been dispelled as a matter of law by the clear and uncontradicted evidence of Appellant that there was no defect in this plane. The most direct answer to this naive argument is to be found in *Sullivan v. Shell Oil Company* (C. A. 9th, 1956), 234 F. 2d 733, 738, wherein the court points out that the accident itself is evidence of the defect.

Appellant relies upon *Leonard v. Watsonville Community Hospital* (1956), 47 A. C. 516, which case held that the uncontradicted testimony of witnesses who were in effect testifying against their own interests was legally beyond doubt, but at the same time held that similar testimony by another witness who stood to benefit thereby was open to question as self-serving and biased. In the case at bar Appellant stands in the shoes of the latter not the former and is subject to the jury's judgment.

Conclusion.

If the case was one which should have been submitted to the jury as Appellees contend, the court did not err in failing to grant Appellant's motion for judgment notwithstanding the verdict. For all of the reasons hereinabove set forth, the judgment on the verdict of the jury should be affirmed.

Respectfully submitted,

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APPENDIX A.

1. Witnesses Located at the East End of Runway.

The take-off run for the fatal flight commenced at the East end of the runway and ended with the crash beyond the West end.

Three witnesses were at the East end of the airport South of the runway at the time of the accident. Richard B. Gottschalk had been an employee of North American Aviation, Inc., for 12 years. He heard the aircraft start its run and thought nothing more about it until the crash signal sounded, at which time he looked toward the West and saw a head of smoke over the top of the fog at the West end of the runway, which was approximately 5,000 feet, or almost a mile, West of where he was. He went directly to the scene of the crash and arrived behind what was probably the third piece of equipment arriving [R. 286]. He testified that the fog was low to the ground [R. 285]; that it was sort of spotty, rolling in and out of places [R. 304].

Rinaldi, the crew chief, and Beaudry, the security officer, were both approximately 400 yards West of the East end of the runway. Rinaldi testified that the fog was West of the West end of the runway [R. 423]. Beaudry said that the fog was between Hangars 7 and 8 because he could not see Hangars 8 and 9 because of the fog [R. 576]. It should be borne in mind that these witnesses were more than half a mile from Hangar 8.

2. Witnesses Located Near the Point of Take-off From the Ground.

Witness Kunzler, an employee of Appellant, was a flight line mechanic on duty at the time of the accident in a crash truck. He was sitting outside the blast wall in

front of Hangar 8. He testified that he was 500 feet South of the runway and 2,000 feet East of the East end [R. 554, 555]. He said that the fog had reached a point a trifle West of Hangar 9 and that it was like a wall of fog that came in at the end of the runway [R. 557]. He could not see the aircraft after it entered the fog bank. The fog extended from 300 feet above the ground [R. 559] to the ground [R. 564].

3. Witnesses Located Southeast of the Point of the Crash.

Two witnesses testified that they were Southeast of the scene of the crash. Mr. Patrick H. Rogers was a flight test inspector at Northrup. He had been in this type of business for about 24 years. At the time of the accident he was on the Northrup ramp leading to the taxiway which was approximately 350 feet East of the West end of the runway and roughly 500 feet South. The fog was all around him. He testified that he saw the plane airborne 25 to 40 feet above the ground before it had reached the end of the runway when there was a loud explosion and a big burst of flame and that he could see nothing more because of the fog [R. 180]. He said that as far as flight conditions were concerned, it was zero at the West end of the runway. He said there was about a 300-foot fog bank rolling in [R. 181]. He could see the outline of the plane in the fog [R. 181]. He thought that the fog ran clear down to Sepulveda [R. 181-182]. Mr. William Pitts, who is a civilian employee for the Air Force testified that he was between Hangars 8 and 9 approximately 1,400 feet East of the West end of the runway and 900 feet South [R. 638]. He saw the plane disappear into the fog at a position of approximately 250 feet Westerly of Hangar 9 [R. 643-644].

4. Witnesses Directly South of the Scene of the Crash.

Three witnesses were going North on Lincoln Boulevard which is located 350 feet West of the end of the flight strip. Appellant's test pilot Kinkella was the closest to the scene of the accident. He had to slam on his brakes to keep from getting into the fire which spread from the plane as it shot across the road. He testified that visibility was about 30 yards at that time and that the fog extended to the ground and Easterly to approximately Hangar 9 and that it was not spotty [R. 535, 551]. Witness Walter Spencer, an aircraft inspector for Douglas Aircraft, who had been 15 years in the business, was driving his car in the direction of the scene of the crash and was 250 to 300 feet South of the place where the plane crossed the road [R. 191]. He saw the plane 30 feet East of the fence on Lincoln Boulevard. He said:

> "A. I didn't think it was too foggy. It wasn't good visibility, but I don't think it was too foggy. I could see pretty well.
>
> Q. When you were 250 to 300 feet from this plane, could you see it plainly? A. I noticed it as it crashed, yes sir." [R. 194.]

He testified that he saw smoke before the plane hit the ground [R. 195].

Witness Robert E. Callagy, an inspector for Douglas Aircraft, associated with the aircraft industry for 20 years, testified that he was traveling toward the scene of the crash 150 to 200 yards South of it [R. 185]. He saw the plane half-way between the end of the runway and the fence, at which time it was airborne and on fire, with flame coming out of both sides of the wing back to

the tail section [R. 186]. He stated that there were blotches of fog and then it would be clear; that it was quite foggy, but that you could see [R. 188].

5. The Character of the Fog.

Above 300 feet the visibility was unobscured [R. 438]. The record shows that fog was coming in on the West end of the runway as above described and it would appear from some of the testimony that this fog extended upward to more than 100 feet because the airplane was seen to disappear into the fog at that altitude [R. 641]. The fog was also said to be close to the ground [R. 285], and see testimony of Edward Kunzler indicating that the fog extended as high up as 300 feet [R. 559] and to the same effect. the testimony of Patrick Rogers [R. 181]. Even if the fog extended 300 feet in the air, at a gradual rate of climb a plane would travel from 100 feet altitude through the fog and be on top in a matter of a few moments [R. 516, 529].

The jury could have concluded that the patchy condition of the fog was such as not to interfere materially with visual reference to the ground or that the time required for passage through it to get on top was so brief [5 to 10 seconds; R. 529] that instruments could not have assisted the pilot, in which event the fog could not have been a contributing factor to the accident, which is to say that the condition of the weather and the pilot's qualifications for instrument flight were immaterial and of no consequence whatever. Or from the other facts, the jury might have concluded that the accident happened so soon after entry into the fog area that the possibility of crash as a result of lack of orientation of the pilot is precluded or even that the area of the crash was so

close to the point of entry into the fog that lack of orientation of the pilot could hardly reasonably explain the accident.

6. Evidence Concerning Flight Clearance and Take-off Instructions.

Decedent was cleared for instrument flight. Instrument clearance is required if at destination or any point along the way instruments are expected to be necessary [R. 172]. There was no evidence of the weather condition at destination or enroute. The Chief Controller at the control tower did not testify that decedent was instructed or ordered to use instruments in take-off. He testified that the Air Route Traffic Control, a Government agency, controls the flight of aircraft between terminals and that this agency leaves the flight of aircraft within the immediate area of the Los Angeles International Airport to the control tower [R. 169, 170]. The Government agency's instructions governing the flight between terminals was Exhibit 3. This did not purport to instruct as to how decedent was to leave the Los Angeles Airport.

The control tower issued its own instructions, Exhibit 3A. Interpreting these latter instructions, the Chief Controller said "instructions were issued to him to climb westbound to on top of the haze or condition, whatever it was at the time" [R. 171]. This did not indicate that the pilot could *not* take off using visual reference [R. 172]. It indicated that "*apparently* there was weather or he *probably* would not have been issued a climb instruction" [R. 173, emphasis added]. This question and answer followed this explanation:

> "The Court: Whether (sic) that indicated he had to use instruments in the take-off?
>
> The Witness: That's right." [R. 173.]

This was a deduction made by the witness [R. 172] from the record before him that the condition of the weather was such as to require instruments. This witness had no recollection of the actual facts [R. 174]. There was no testimony that conditions were such that all flights were required to use instruments in take-off.

Mr. Lemmer, who was the Chief Controller, was not present at the time of the accident [R. 174]. Mr. Fischer was the Acting Chief Controller as is indicated on Exhibit 2, or, as he described himself, was Supervisor of the Watch and present in the tower at the time of the accident and was produced as a witness for defendant. He was not asked directly whether the weather was such that clearances were only being granted on instruments. Despite his positive answers to questions by counsel for defendant that the flight in question was an instrument take-off [R. 434] and that the reason for the instrument flight clearance was the reduced visibility [R. 445], his testimony taken as a whole indicates that the Military controls all military flights and issues instrument clearances where appropriate [R. 434-446].

There is nothing to indicate that these clearances do not depend upon weather in route or at destination and that the flight clearance given by the tower corresponds with the Military clearance. He pointed out that the tower does not control military aircraft departures [R. 438] except to release them into the traffic in a manner consistent with safety [R. 443]. He also testified that the airport handled about one thousand planes a day and that he did not consider the conditions dangerous for take-off at the time of the accident and that the existing conditions were "fairly common, fairly normal" [R. 442]. As far as he was concerned, "there was absolutely nothing

abnormal in this first preparation for flight or in the flight or the take-off" [R. 444]. The majority of pilots are visual flight rule pilots [R. 445]. All of this would indicate that he drew his own conclusions about the reason for the Military Flight Clearance and that weather conditions at the airport were not such as to require him to refuse clearance except on instrument flight rules or the traffic would have been greatly reduced.

Test pilot, Frank Smith, testified that in his opinion the condition of the weather was such as to require instruments [R. 513].

Whether it was "instrument weather" or not seems to be a question for the jury and not an "uncontradicted" fact either way.

Appellant's brief is most misleading by choice of expression at page 4 where it is said that when the airplane became air borne, "the weather was so bad that it could not be seen from the control tower." The plane became air borne at about Sepulveda Boulevard [R. 556] which is more than one mile from the tower. The references given to support this statement are entirely foreign to the subject matter. The record at 519, 523 and 524 refers to the testimony of Frank Smith, a test pilot who was at the Flight Office at North American Aviation from whence he observed the plane go down the runway a distance of 2500 to 3000 feet. It was still on the cement when he last saw it as it passed the range of visibility in the obscuration [R. 524]. The record at 640 is the testimony of Mr. Pitts who was near hangars 8 and 9 and saw the plane leave the ground.